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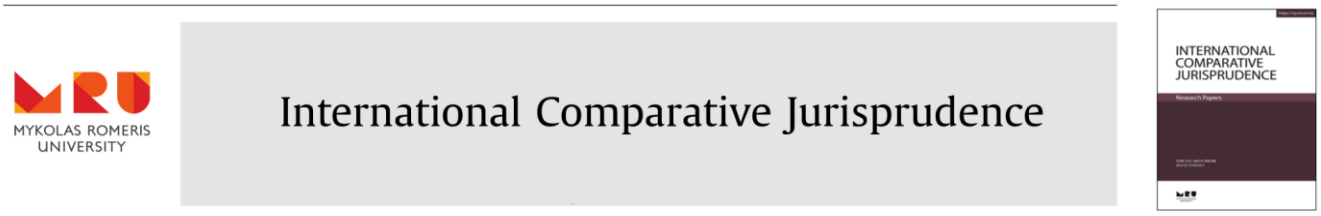


# PROPERTY LAW IN THE CONFLICT OF LAWS: EUROPEAN AND EAST ASIAN REGULATORY MODELS

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**Abstract.** The economic development of some East Asian states generates interest for the key features of East Asian national legislation when applying their experience in the law-making activities of the other states. One of these key features can be represented by a special model of cross-border property relations regulation concerning movables that tend to have a considerable influence on transnational business interaction. The aim of the article is to look over the patterns of European and Asian regulatory models of cross-border movable property relations and to compare their ability to induce cross-border economic cooperation. This article examines the opportunity to adopt the successful experience of legal regulation in this sphere and also highlights some of the differences that may inhibit business interaction between entrepreneurs from European and East Asian countries.

**Keywords:** Property Law, Movable Property, Conflict of Laws, Party Autonomy, Closest Connection Principle, European countries, East Asian countries.

## Introduction

The economic development of some East Asian states generates interest for an analysis of the key features of their legislation when applying their experience in the law-making activities of the other states. Cross-border property relations arising over movables, especially goods and equipment, tend to have a considerable influence on transnational business cooperation. Moreover, effective legal regulation of cross-border property relations may contribute to growth of the economy of a state (Ginsburg, 2000, p. 830). The aim of this article is to look over the patterns found in European and Asian regulatory models of cross-border movable property relations and to compare their ability to induce cross-border economic cooperation. This article examines the opportunity to adopt the successful experience of legal regulation in this sphere and also highlights some of the differences that may inhibit business interaction between entrepreneurs from European and East Asian countries.

While comparing and contrasting European and East Asian regulatory models of cross-border property relations concerning movables, we also use some elements of historical and cultural analysis in order to determine the origins of the similarities and dissimilarities found amongst these models.

Relatively few studies devoted to comparing the major legal conceptions of cross-border property relations regulation concerning movables have been carried out (see, for example, Leibküchler, 2013; Huo, 2011), but most of these studies state a list of the dissimilarities found amongst these conceptions and little attention is paid to the process of

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mutual influence and interaction between the above-mentioned European and East Asian regulatory models. In putting emphasis on their interaction, our approach to comparing and contrasting these models identifies the legal problem that arises from contradictions found between the regulatory models that may inhibit business cooperation between entrepreneurs from European and East Asian states. We also try to propose a solution for this problem.

National legislation is based on different approaches to the regulation of cross-border property relations arising over movables, but it can be seen that in most cases these approaches have a lot in common within the region (macroregion) and differ significantly between the regions (Verhellen, 2013, p.540). Among all of the models of legal regulation of cross-border property relations arising over movables, two different ones may be highlighted, namely, regulatory models supporting the national legislation of European and East Asian states. Of course, these approaches have some similarities because East Asian legal systems have been influenced by the law of European states over a long period of time (for example, China, Vietnam, North Korea, Macao, South Korea).

For example, during the early ’60s of the 19th century, the law of mainland China was influenced by European legal systems, mostly by German law. Subsequently, the development of Chinese law has been based on the model of Soviet law that had absorbed some legal categories of German law. The legal system of Macau, a former Portuguese colony, has been influenced by Portuguese law, and the legal system of Vietnam has been largely influenced by French law (Lunz, 1965, p. 27).

However, during the second half of the 20th century, the legal systems of East Asian states began to develop independently from the law of European countries, however, legal institutions which were originally developed as a part of the European approach to cross-border property relations regulation were still maintained (Weizuo, 2013, pp. 114-116). This fact makes the European and East Asian regulatory models of cross-border property relations more similar as compared to the development of East Asian legal systems, as if it had not adopted the basic provisions of the European approach. For example, traditional Chinese law that was in force until 1911 contained legal concepts and categories that had no direct analogues in European legislation.

In developing their own regulatory models over the past several decades, today’s East Asian legal systems are showing characteristics that do not resemble the European approach. At the same time, the regulation of the movable property relations of East Asian states with a foreign element has changed significantly since the beginning of the 2000s, and these changes seem to have similar tendencies that will be further discussed. However, these facts show that the legal systems of East Asian states tend to form an approach to cross-border property relations regulation concerning movables that differs from the approach previously developed by European lawmakers.

The differences found in mentality and management systems that were being formed for thousands of years can be attributed to cultural diversity (Foblets, M.-C., Yassari, N., 2013, p. 17). The influence that the German and French legal systems have had for several decades cannot compete with the many years of history involved in the formation of the legal culture in East Asia. Over the past decade, special characteristics have developed, based on the influence of what was previously borrowed from European countries. Some scientists call this process “the restoration of the national conception of Private international law”, while others say that it is “a symptom of stronger nationalization and a trend away from internationalization” (Leibküchler, 2013, p. 362). In our opinion, this phenomenon is a reflection of the process of regionalization gradually entering into competition with globalization as the main trend of previous development.

It has to be mentioned that one of the most important aspects of cross-border property relations regulation is that its provisions are contained mainly in the national legislation of the states. This concerns both European and East Asian states. The point is that in East Asian legislation, the rules governing cross-border property relations arising over movables have undergone their biggest changes since the early 2000s. That is why nationalization, regionalization and globalization, when viewed as competitive legislative trends, have had a significant influence on the formation of cross-border movable property relations regulation.

**1. The origins of dissimilarities between European and East Asian regulatory models of cross-border property relations arising over movables**

As in many European legal systems, such as the systems of Germany or Switzerland, special importance is given to the legal structuring and harmony of law provisions. If we consider the fact that German legal doctrine has influenced the formation of a large amount of the national legislation of European states, it becomes clear as to why there is such a cautious attitude toward the application of the party autonomy principle in cross-border property relations. The party autonomy principle is one of the core principles of private international law, and provides contractual parties with the opportunity to determine the applicable law by agreement. However, European legal doctrine highlights that, in addition to the positive features of the party autonomy principle, there are also negative aspects found in its application. It creates conditions for the circumvention of the law, and therefore requires special methods for protection against such abuses as specified (Nial, 1960, p. 286). To the contrary, the legal doctrine and practice of East Asian states (China, Vietnam, Republic of Korea and others) do not put emphasis on the orderliness and coherence of legal categories. In East Asia, it is more important to have the opportunity to adapt to the counterparty circumstances and special conditions and, therefore, to have the opportunity to fix all the smallest details of a contract (Du, 2014, p. 103). Perhaps this is the reason why the party autonomy principle, being rather flexible in adjusting conditions for the transfer of ownership, is so widespread in East Asian legislation concerning cross-border movable property relations.

Professor Fukuyama identifies societies with a high degree of social trust including European states and low-trust societies, which include the East Asian states. According to his estimation, East Asian nations may be characterized by a low level of trust in legal institutions, as well as towards judicial authorities (Fukuyama, 1996, pp. 61-83). The factor of trust exerts a strong influence on the application of the closest connection principle, where in situations specified by law, the determination of the applicable law may depend on the discretion of the judge and, therefore, the judge will decide with which legal system the legal relationship in question is most closely connected. From the East Asian perspective, given the right to define the applicable law to public courts, regardless of conflict of law rule, can lead to unexpected results. When confidence in public court decisions is low, the specification of the closest connection principle as the main conflict of law provision does not seem obvious. That is why this conflict of law principle is rarely seen in East Asian legislation.

At the same time, European national legislation widely applies the closest connection principle in relations characterized by a foreign element in general, and to cross-border movable property relations in particular. It is fixed within the legislation of such states as Germany (Section 46 of the EGBGB), Austria (Article 1 of the IPRG), Macedonia (Article 3 of the PIL Act), Netherlands (Article 8 of the Civil Code), Czech Republic (Article 24 of the Act on PIL), and Switzerland (Article 15 of the CPIL). Apparently, this fact evidences that high-trust societies, including European countries, are characterized by a high degree of confidence in legal authorities as well (Fukuyama, 1996, pp. 149-161), and that seems to be the reason why the closest connection principle is widely accepted by European national legislators. Concerning this issue, Raymond Legeais highlighted the important role of the courts as the legal regulators in Europe by saying: “The real law depends primarily on the judges.” (Legeais, 2004, pp. 60-78).

A comparison between European and East Asian regulatory modes of cross-border movable property relations by using the criteria of “the right to determine the applicable law” and the application of the party autonomy principle and the closest connection principle in Europe and East Asia has been carried out intentionally. The closest connection principle and party autonomy principle are basic elements in the conflict-of-laws regulation structure. They provide a choice of applicable law made by a legislator, judge or by the parties of a contract (Riphagen, 1961, p. 73). Despite the difference between specific conflict of law rules, the logical structure of cross-border property relations regulation concerning movables is based on a combination of these three methods as employed for determining the applicable law. However, the choice of the applicable law determined by a legislator is generally accepted (in civil law), but not every legal system recognizes the choice of applicable law made by the parties of a contract or made by a judge in cases involving the application of the closest connection principle. Thus, when it comes to contrasting and comparing

the European and East Asian models of cross-border movable property relations, it seems appropriate to carry it out by investigating how the closest connection principle and the party autonomy principle are specified in these models.

**2. Party autonomy principle and the way it is specified in the European and East Asian regulatory models of cross-border property relations arising over movables**

One of the vital issues that distinguishes the East Asian model is , the expanding of opportunities for the parties of a contract to determine the applicable law by agreement. Conversely, when it comes to property relations arising over movables, European national legislation does not recognize the party autonomy principle (Austria, Hungary, Albania, Germany, Italy, Latvia, Greece, the Netherlands, Luxembourg), or restricts it considerably (Spain, Lithuania, Switzerland). For example, according to Article 10 of the Civil Code of Spain, the parties of a contract may choose the law of the country of destination as the law that is applicable to property rights with respect to *res in transitu*; in the absence of agreement on the choice of law, the law of the country of departure should be applied. Article 1.49 of the Civil Code of Lithuania and Article 104 of Switzerland's Federal Code on PIL provide a range of possible options for the choice of the applicable law: the parties of a contract which transfers ownership may choose between the law of the country of departure, the law of the country of destination, or the law that is applicable to the underlying transaction. A similar provision is contained in Article 119 of the Draft Civil Code of Serbia (2014).

Apparently, European national legislation is based on the principle of "localization of party autonomy" with respect to the regulation of property rights (Struycken, 2004, pp. 369-372). The localization of party autonomy principle means that the parties of a contract may select the applicable law from a fixed list of options. They cannot choose the law of a state that is not connected with the given legal issue under consideration. The main advantage of the principle of localization of party autonomy is that, in general, legal relations are governed most effectively by the law of the State to which they are connected, where these legal relations can be localized. At the same time, providing the parties with the possibility to choose the law of any state without limitation and without using the principle of localization of party autonomy creates a more favourable environment for commercial transactions. There is a contradiction between the intentions of European legislators to provide coherence in the legal regulation of cross-border property relations and harmony between their judgments in this field, and to also try to support the commercial sphere.

The practice of mutual influence in global approaches to the regulation of cross-border relations shows that the principle of "localization of party autonomy" cannot compete with the opposite principle, which allows parties to choose the law of a State that is not related to the issue under consideration. This can be demonstrated by the history of application of the party autonomy principle to contracts. Initially, only common law system legislation did not require a connection between a contract and the law chosen by the parties. However, as a rule today in modern codifications, including European national legislation, this requirement has been eliminated (Symeonides, 2014, pp. 116-120). The approach that was originally formed within the common law system has gradually become accepted throughout the world. Similarly, in the future, despite the reasonable application of the of "localization of party autonomy" principle in cross-border property relations arising over movables, it might be abolished as well, because it has increasingly become less and less effective in corresponding to the needs of the commercial sphere.

Another advantage of the approach enshrined in European national legislation is a provision stating that the choice of the applicable law shall not affect the property rights of third parties. All European legislation that extends the application of the party autonomy principle to property relations over movables contains this provision. In other words, when it comes to property relations, the party autonomy principle has a limited form, and is only valid *inter partes*. This can be characterized as a positive feature of its application because the direct choice of an applicable law by the parties that is valid *erga omnes* may lead to a violation of the rights of third parties, and does not take into account the interests of economic turnover (Brand, 2013, pp. 152-154).

As a rule, within the framework of the European approach to cross-border movable property relations regulation, the opportunity to determine the applicable law is only provided to the parties involved with respect to the ownership of goods in transit. Conversely, a broader use of the party autonomy principle with respect to property relations over

movables is typical for East Asian legislation (Clarke, 2010, p. 220). The party autonomy principle developed within the legal doctrine of the Western countries has successfully found a "fit" within the East Asian regulatory model of cross-border property relations arising over movables, since the application of this principle corresponds to the interests of parties and provides more opportunities to take into account the interests of the buyer.

One of the most cautious attitudes towards the application of the party autonomy principle with respect to movable property among East Asian legislation can be found in Article 766 of the Civil Code of Vietnam, where the party autonomy principle is applied only to property rights concerning goods in transit. Meanwhile, the legislation of Mongolia (art. 547 of the Civil Code of Mongolia) and Chinese law (§37 and §38 of Act on the Application of Laws over Foreign-related Civil Relations) extends the application of this principle with respect to all types of movable property and not only to goods in transit. The choice of law by the parties is not limited by the range of possible options. According to the provisions mentioned, the parties may choose the law of any State as the law that is applicable to rights *in rem*, even if it is not related to the corresponding legal issue. The party autonomy principle is considered here as a fundamental principle of conflict of laws regulation (Tu, 2016, pp. 61-64). Other conflict rules may only be applied in the absence of an agreement between the parties of a contract. Furthermore, one of the special features involved in the application of the party autonomy principle to property rights over movables in East Asian legislation is that it has an unlimited character, because there are no other provisions that might otherwise provide protection of the rights of third parties in this case.

On one hand, the application of the party autonomy principle not only to goods in transit, but to all types of movables that is common for the East Asian approach may be justified, since the use of it contributes to the fullest realization of the intentions (interests) of the parties of a contract providing a transfer of ownership (Huo, 2011, p. 670). Given the possibility of the parties to a contract to determine the law which is applicable to the transfer of ownership may have a positive effect on the development of foreign trade when goods and equipment as the objects of property rights cross the borders of States (Lowenfeld, 1994, p. 267). On the other hand, commercial turnover dictates the need for taking into account the interests of third parties and unfortunately, that provision has not been implemented within the framework of the East Asian approach.

For the further development of cross-border economic relations, European national legislation will sooner or later have to adopt a broader use of the party autonomy principle, namely, to extend its application not only to goods in transit, but also to all movable objects of ownership. The needs of economic development may force European legislators to give to the parties of a contract the right to choose the law of a State that is not connected to the legal issue under consideration. It is also necessary to realize that cooperation with entrepreneurs from East Asian states where the principle of "localization of party autonomy" concerning property rights over movables has not been widely accepted by legislators will be focused on the choice of law of any State, even if it is not connected to legal issue under consideration. At the same time, there are positive features of the European model that should not be lost during the mutual influence of global approaches to cross-border property relations regulation. The most important of them is that the application of the party autonomy principle to cross-border property relations arising over movable property should be limited by the principle of protection of the rights of third parties.

### 3. The contradiction between the party autonomy principle and the closest connection principle, when determined as the main conflict of law principles under the East Asian and European regulatory models of cross-border property relations arising over movable property

However, extending the scope of application of the party autonomy principle is also necessary. Otherwise, East Asian entrepreneurs and companies might consider intraregional cross-border transactions to be more attractive than interregional proprietary relations. That may also derive from the fact that, according to the legislative provisions of several European countries, the closest connection principle is specified as the basic conflict of laws principle, and it exerts a strong influence on cross-border property relations regulation.

It should be mentioned that the closest connection principle has a dual nature. On one hand, it is intended to ensure the determination of the applicable law in cases concerning a legislative gap, or in cases where the application of the conflict of laws rule does not lead to a determination of the applicable law. In this way, the closest connection principle is applied in addition to other conflict of laws rules (Hambro, 1962, pp. 53-54), but on the other hand, the closest connection principle, when determined as the main principle applicable in conflict of laws regulation, has the power to correct the application of the conflict of laws rules (Marshall, 2012, pp. 16-18). In particular, this means that the use of this principle may have priority over the rest of the conflict of laws regulation. Depending on the meaning given to this principle by certain legislation, a hierarchy of the choice of law levels can be established. Thus, according to different law systems, the choice of applicable law made by the parties of a contract by a judge or legislator may create different levels of priority.

Despite some elements of subjectivism that might be induced by the application of the closest connection principle, it has become increasingly common among the legislation of European countries and, considering recent amendments, it is often determined as the main conflict of laws principle. For example, according to Article 1 of the Austrian International Private Law Act, "(1) the circumstances of the case related to foreign element are treated in private law according to the rules of the legal order with which there is the closest connection. (2) Certain rules concerning determination of the applicable law contained in this Federal Law Act are considered as an expression of this principle." More specifically, this principle was formulated in Article 15 of the Swiss Federal Law on PIL: "As an exception, the right that is specified by this Act is not applied if, taking into account all the circumstances of the case, it is obvious that the case has insignificant connection with this legal order and at the same time has much closer connection with the law of some other state." In a great amount of the legislation of European states, the closest connection principle seems to have assumed a priority over other conflict of laws rules, including the legal regulation of cross-border property relations arising over movables, while in both Austrian and Swiss private international law, the closest connection principle, when determined to be the main conflict of laws principle, is applied to all private relations characterized by a foreign element, and a similar rule specifically related to property rights is contained in Section 46 of the EGBGB.

In fact, according to European regulatory model of cross-border property relations arising over movable property, the law of a state that may be unexpected for parties under litigation may be applied if a judge decides that the given case is more closely connected with this particular legal order (Cordero-Moss, 2014, pp. 144-146). According to Austrian and German legislation, a court may apply the closest connection principle, even when the parties of a contract have previously come to an agreement on the law that they prefer to be applicable to the transfer of ownership over movables. Moreover, German law does not recognize the party autonomy principle, while Austrian law recognizes this principle, but it cannot be applied to property relations. Other European countries whose legislation determines the closest connection principle as the main conflict of laws principle only provide for the possibility of its use in the absence of the choice of law. In other words, if the parties of a contract have come to an agreement on the choice of applicable law and the law of the forum recognizes the application of the party autonomy principle with respect to this type of legal relation, the law chosen by the parties of the contract will be applied even in cases where there is a closer connection between the given property relations and some other legal order.

There are several European states whose national legislation has determined the closest connection principle to be the main conflict of laws principle, but do not extend its application to cases where the parties of a contract have already chosen the applicable law. They are Macedonia (Art. 3 of the PIL Act), the Netherlands (Art. 8 of the Civil Code), the Czech Republic (§ 24 of the Act on the PIL) and Switzerland (Art. 15 of the CPIL). This list has a tendency to expand, because the aforementioned rules have been set or amended during the last fifteen years. Meanwhile, among the given legislation, only Swiss law extends the scope of application of the party autonomy principle to the transfer of ownership concerning movables, but only when it comes to goods in transit. It turns out that even if the parties of a contract have chosen the applicable law with respect to the transfer of ownership over movable property, the courts of the above-mentioned European states, with the exception of Switzerland, will not recognize this agreement because, in accordance with their legislation, the scope of application of the party autonomy principle does not include property relations over movables and, therefore, there is still a possibility of application of the law chosen by the court.

An agreement on the choice of the applicable law concerning property rights over movables whose conclusion is typical for East Asian states is only likely be recognized by the courts of European states when the following conditions are met:
1. The law of the forum excludes cases when the parties of a contract have already chosen the applicable law from the scope of application of the closest connection principle determined as the main conflict of laws principle.
2. The legal system of this European state recognizes the party autonomy principle.
3. The law chosen by the parties of a contract corresponds to the principle of "localization of party autonomy". In other words, the legal order chosen by the parties is included in the list of options allowed for the choice of applicable law concerning property relations.
4. The scope of application of the party autonomy principle includes property relations concerning a particular type of objects (goods in transit or all types of movables).

If at least one of the given conditions is not met, then the risks that the law chosen by the parties of the contract will not be applied by national courts increase in those European states where the closest connection principle is generally determined as the main conflict of laws principle.

It should be mentioned that specifying the closest connection principle as the main conflict of laws principle, according to national legislation of some European states, is not the only obstacle for the interaction between East Asian and European entrepreneurs. This economic interaction might be complicated because the national legislation of most European countries does not allow the application of the party autonomy principle to property relations arising over movables. The exceptions are the rules specified in Article 104 of the Swiss CPIL, par. 1 of Article 10 of the Spain Civil Code, and in Article 1.49 of the Civil Code of Lithuania. According to these articles changed throughout 2011–2013, the scope of application of the party autonomy principle only includes goods in transit. Therefore, the fourth condition mentioned above, in our opinion, is the most important one in order to provide intraregional proprietary interaction.

The closest connection principle developed within the European regulatory model of cross-border property relations arising over movable property and widely used while developing and changing national law in an increasing number of European countries contradicts with the party autonomy principle that is becoming more common for East Asian legislation. This contradiction can be resolved, first of all, by setting the scope of the application of the closest connection principle in those cases where the parties of a contract did not come to an agreement on the choice of the applicable law and, secondly, by extending the scope of the party autonomy principle application to property relations over all types of movables. Thus, in order to provide a reliable legal basis for a broader movement of goods and equipment between European and Asian states, it seems reasonable to come to a certain balance between application of the closest connection principle and the party autonomy principle with respect to cross-border property relations arising over movables.

**Conclusions**

A special regulatory model of cross-border property relations concerning movable property is forming within the national legislation of East Asian states such as China, Vietnam, Mongolia, etc. This approach is characterized by the following features:
1) The scope of application of the party autonomy principle is wider than specified in most national European legislation. In comparison with the European approach to application of the party autonomy principle, the East Asian model provides for its almost unlimited character. It lacks taking into account the rights of third parties and it is not limited by the principle of "localization of the party autonomy", which requires the law chosen by the parties to be connected with the given legal relation.
2) East Asian legislation does not consider the closest connection principle as the main conflict of laws principle that may have priority over other rules concerning cross-border property relations arising over movables.

Conversely, the European approach to the regulation of cross-border movable property relations is based on the following principles:
1) The scope of application of the party autonomy principle is limited by the obligation of taking into account the rights of third parties, and by the establishment of the "localization of the party autonomy" principle.
2) The closest connection principle is determined as the basic conflict of laws principle that may have priority over the application of the other conflict of laws rules set for this particular category of movable property (the rules determining the applicable law through lex rei sitae, lex destinationis, lex originis, etc.) or even over the application of the law chosen by the parties of the contract.

As shown above, during the interaction between entrepreneurs from European and East Asian states involving cross-border property relations, the emphasis is put on legal risks. In particular, there is a risk that an agreement on the choice of law made by the parties may not be recognized by a court considering a dispute over ownership. One of the origins of the emergence of these risks is that the application of the party autonomy principle to the cross-border property relations arising over movables is not effective, according to the rules of most national European legislation. The other reason is that the closest connection principle, when determined as the main conflict of laws principle in a large number of European legal systems, contradicts with the party autonomy principle, which has become increasingly common in East Asian legislation.

For example, this may occur in a situation when a dispute over movable property arises between Chinese and German entrepreneurs and is considered in a place where the movables are situated, namely, in a German court. Even if the parties of a contract have already chosen Chinese law as the law that is applicable to the transfer of property rights between the parties, there is still a possibility that a German court might apply German law, which has a closer connection with the legal issue under consideration. In this way, the court decision will certainly be unexpected for the parties of the contract or even unacceptable for the Chinese party. East Asian entrepreneurs who prefer to specify all the details of the transaction and to rely on the effectiveness of the party autonomy principle might not consider legal relations with European partners preferable while assessing the legal risks of such cooperation. Thus, it is necessary to come to a compromise between European and Asian regulatory models of cross-border property relations arising over movables that may be provided by the following general characteristics:
1) The scope of application of the party autonomy principle should be extended to property relations over all categories of movables and should not be limited by the principle of "localization of the party autonomy". However, limitation of the party autonomy principle's application by the obligation of considering the rights of third parties should be maintained. The choice of law that is applicable to cross-border property rights made by the parties of a contract should not affect the rights of third parties.
2) The scope of application of the closest connection principle should not be applied to cases when the parties of a contract have already chosen the applicable law.

Implementation of these provisions may be possible through concluding bilateral treaties on legal assistance and legal relations in civil cases or through revising the provisions of existing agreements between European and East Asian states. In our opinion, the implementation of these measures may contribute to an increase in the amount of cross-border movement of goods and equipment being transported between European and East Asian states.

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